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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	Chapter 11
	:	
DJK RESIDENTIAL LLC, <i>et al.</i> ,	:	Case No. 08-10375 (JMP)
	:	(Jointly Administered)
Debtors.	:	
	:	Judge James M. Peck
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**OBJECTION OF LANDERHAVEN II LLC
TO CONFIRMATION OF DEBTORS' PREPACKAGED
JOINT PLAN OF REORGANIZATION**

Landerhaven II LLC ("Landlord"), landlord under a Lease Agreement dated August 3, 2000 (as amended, the "Lease"), with SIRVA Relocation, LLC (as successor to Cooperative Resource Services, Ltd.) ("Tenant"), one of the captioned debtors and debtors in possession (together with Tenant, collectively, "Debtors"), objects to confirmation of the Debtors' proposed Prepackaged Joint Plan of Reorganization [Docket 31] (the "Plan"). The Plan discriminates unfairly and is not fair and equitable with respect to Landlord's claim and similar unsecured claims proposed to be classified as Class 5 Claims. The Plan's discriminatory classification and treatment of Landlord's and similar claims, as compared to all other classified unsecured claims against Debtors, violates various provisions of Chapter 11 of the Bankruptcy Code, including

section 1129(b)(1) of the Bankruptcy Code. In support hereof, Landlord respectfully states as follows:

INTRODUCTION

1. The Plan violates section 1129(b)(1) of the Bankruptcy Code because the Debtors fail to articulate a legitimate basis for classifying and treating the claims of similarly situated unsecured creditors differently under the Plan. The Debtors have divided unsecured claims into two classes – those that the reorganized Debtors intend to continue to do business with post-confirmation and those that the reorganized Debtors no longer have a need for post-confirmation. Holders of unsecured claims that continue to have an on-going relationship with the reorganized Debtors will receive a 100% distribution on account of their claims in Class 4 under the Plan. Class 5 Claims, however, will receive no distribution – 0%. Class 5 appears to be composed of 2 landlords whose non-residential real property leases were rejected as of the Petition Date, with the remainder primarily consisting of litigation claimants and prospective post-petition rejection claims of landlords which are treated as prepetition claims as a matter of law.

2. On March 4, 2008 (Docket # 198), the Debtors filed a list of holders of Class 5 Claims which they stated would not be altered absent further order of this Court. This designation does reference “David Development Group” and Jeff Davis, who is affiliated with Landlord. Without waiving its rights, including Landlord’s right to have its rejection damage claim properly classified together with the Class 4 Unsecured Claims, Landlord is treating this designation as relating to Landlord and its prospective rejection damage claim.

BACKGROUND

3. Landlord and Tenant are parties to the Lease that expires October 31, 2017. Tenant leases approximately 79,000 rentable square feet of commercial office space, and

approximately 11,000 square feet of garage space, located at 6070 Parkland Blvd., Mayfield, Ohio 44124 (the “Property”).

4. On February 5, 2008, the Debtors filed their petitions for relief under Chapter 11 of the Bankruptcy Code (the “Petition Date”).

5. On the Petition Date the Debtors also filed the Plan and accompanying proposed Disclosure Statement. The Plan establishes eight classes of claims, two of which pertain to unsecured claimants – Class 4 and Class 5. Unlike most prepackaged plans which modify the rights of note holders or other financial lenders while maintaining the status quo for other creditors and parties in interest, this Plan carves off a few “undesirable claims”.

LAW AND ARGUMENT

6. The Plan is not confirmable under the Bankruptcy Code because the Plan provides unfair, discriminatory and unequal treatment to similarly situated unsecured claims. Pursuant to Section 1129 of the Bankruptcy Code:

[i]f all of the applicable requirements of subsection (a) of this Section other than paragraph (8) are met with respect to a plan, the Court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims of interests that is impaired under, and has not accepted, the plan.

7. A plan of reorganization should not be confirmed if it provides substantially different treatment to similarly situated claims, absent a legitimate basis for doing so. Many Courts have addressed the issue of disparate treatment and have overwhelmingly rejected the approach taken in this Plan. From a philosophical perspective, the Debtors are arguing the philosophy of Jeremy Bentham and John Stuart Mills – the greatest happiness of the greatest number. Unfortunately for the Debtors, Utilitarianism is an anathema of the Bankruptcy

Code and has been roundly rejected – even in the case where funds of a secured creditor are “shared” effecting the disparate treatment prohibited under the Bankruptcy Code.

8. In *In re Tucson Self-Storage, Inc.*, 166 B.R. 892, 898 (9th Cir. 1994), the debtors’ plan provided a 100% payment to trade creditors while two deficiency claimants would receive 10% distributions. The court refused to confirm the debtors’ plan due to the widely disparate treatment of similarly situated creditors.¹ The only justification offered by the debtor was its assertion that the full payment for goods and services was consistent with sound public policy.² The court determined that this was not a legitimate basis for discriminating against similarly situated unsecured creditors and refused to confirm the plan.

9. Similarly, in *In re ARN LTD. Limited Partnership*, 140 B.R. 5 (Bankr. D. Col. 1992), the Court held that similarly situated claims must be treated equally, when no justification for discrimination exists. In determining that debtor failed to demonstrate that a sound justification existed for the disparate treatment of the impacted classes, the Court applied a 4-part test,³ which consisted of: 1) whether the discrimination has a reasonable basis; 2) whether the debtor can carry out a plan without such discrimination; 3) whether such discrimination is

¹ *Id.*, citing *In re Caldwell*, 76 B.R. 643, 646 (Bankr. E.D. Tenn. 1987) (Court denied confirmation of Chapter 11 Plan that proposed to pay class of unsecured claims 100% but proposed to pay all other unsecured claims 22.7%); see also *Barnes v. Whelan*, 689 F.2d 193, 202 (Although a Chapter 13 case, court held that a “99% differential in payments between separate classes of general unsecured creditors was unfair discrimination because debtor could not demonstrate a legitimate reason to justify departure ... that all unsecured creditors should be treated alike.”) (emphasis added).

² *Id.*

³ Because the Bankruptcy Code does not specify any standard for determining the fairness of discrimination, various tests have been developed to assist courts in concluding whether a sound justification exists. *In re Crosscreek Apartments, Ltd.*, 213 B.R. 521, 537 (Bankr. E.D. Tenn. 1997), citing, 7 *Collier on Bankruptcy* §1129.04 [3][a] (15th ed. Rev. 1997).

proposed in good faith; and 4) whether the basis for the discrimination demands that this degree of differential be imposed.⁴

10. Here, regardless of the test this Court applies, the Plan unfairly discriminates against Class 5 Claims because the Debtors cannot articulate a legitimate basis for treating unsecured claims differently.⁵ The Debtors' Disclosure Statement is silent and provides no sound justification for such widely disparate treatment. Moreover, the Debtors provide no reason as to why it could not carry out the Plan without such discrimination (such as perhaps providing slightly less than 100% to include Class 5 claimants in Class 4). For preferred payment of one creditor or class over others to be permissible in a chapter 11 case, the Court must find an acceptable basis for the preference.⁶ Here, no basis exists and thus, disparate treatment of the classes should not be imposed.

11. In its current form, the Plan provides the Debtors with the unilateral right to arbitrarily pick and choose the unsecured claims that will be paid in full, and those which will receive nothing at all. The "focus on a particular claim should not be the claimholder, but rather the legal nature of the claim."⁷ An unsecured claim is simply that, an unsecured claim. Thus, the Debtors cannot be permitted to satisfy, in full, the claims of one class and fail to pay similar claims anything. Thus, the Plan unfairly discriminates against Class 5 Claims and should not be confirmed.

⁴ *Id.* at 13, citing *In re Ratledge*, 31 B.R. 897, 899 (Bankr. E.D. Tenn. 1983)

⁵ *In re Crosscreek Apartments, Ltd.*, 213 B.R. at 537, citing, 7 *Collier on Bankruptcy* §1129.04[3][a]. ("Regardless of the particular test to which one ascribes, one thing is clear: at a minimum there must be a rational or legitimate basis for the discrimination and the discrimination must be necessary for the reorganization.")

⁶ *In re Mortgage Inv. Co. of El Paso, Tex*, 111 B.R. 604 (Bankr. W.D. Tex. 1990).

⁷ *In re Eisenbarth*, 77 B.R. 228, 236 (Bankr. D.N.D. 1987), citing *In re AOV Industries, Inc.* 792 F.2d 1140, 1150 (D.C. Cir. 1986).

CONCLUSION

Landlord objects to confirmation of the Plan on the grounds that it violates various sections of the Bankruptcy Code, including section 1129(b)(1). Landlord requests that the Court deny confirmation of the Plan.

Dated: March 10, 2008
Cleveland, Ohio

Respectfully submitted,

/s/ Stuart A. Laven, Jr.

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CERTIFICATE OF SERVICE

On March 10, 2008, I caused a copy of the foregoing Objection to be served on the parties below via the Court's ECF system (with respect to parties registered to receive ECF filings in this case) and, as specified below, also via FedEx Next-Day Priority overnight delivery:

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